



May 5, 2006

The Honorable Martin J. Gruenberg
Acting Chairman
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Mr. John F. Carter
Regional Director
Federal Deposit Insurance Corporation
25 Jessie Street at Ecker Square
Suite 2300
San Francisco, California 94105

Re: Wal-Mart Bank Application

Dear Acting Director Gruenberg and Regional Director Carter:

We appreciate the opportunity to address a number of the comments expressed in the letters submitted to the Federal Deposit Insurance Corporation ("FDIC") and in the recent hearings held by the FDIC in Washington and Kansas City regarding the pending FDIC insurance application by Wal-Mart Stores, Inc. ("Wal-Mart" or "the Company") for the proposed Wal-Mart Bank (the "Bank"). We have attempted to review, understand and reflect on the statements made by witnesses at the hearings and in written comments and accordingly wish to provide a supplemental response for the record.

The principal concerns expressed in the hearings and earlier written comments fall into several categories. This letter amplifies our testimony and clarifies the record in these areas. We stand ready to respond further to any issues or concerns that you believe have not been fully addressed and might affect your ability to act affirmatively on our application. We also may provide additional supplemental information if it would assist the FDIC in its review of this application.

Independence of the Bank from its parent

The Utah Department of Financial Institutions and the FDIC have made it abundantly clear to the industrial bank community in general, and to Wal-Mart specifically, that it is absolutely essential that an FDIC-insured industrial bank demonstrate and maintain appropriate independence and separateness from its parent and other affiliates. Absent such independence and separateness, neither a charter nor deposit insurance would be approved.

Wal-Mart's application reflects its intention and commitment to establish and maintain that level of independence and separateness. The Bank's premises and operations will be physically separate from Wal-Mart and the Bank does not intend to employ any person who is a joint employee with Wal-Mart. Additionally, both the CEO and CFO have been recruited from outside Wal-Mart and have over 36 years of combined experience in the banking industry. It is contemplated that all Bank personnel will reside in Utah.

Further, a majority of the Board of Directors will be independent individuals residing in the State of Utah. The Bank will have its own internal auditor and the Audit Committee of the Bank's Board of Directors will be comprised entirely of independent directors. All of the directors, whether inside or independent, have fiduciary duties to act in a manner consistent with the best interest of the Bank. The Bank's application for deposit insurance includes a detailed draft policy on affiliate transactions that specifically addresses the independence of the Bank from Wal-Mart and prescribes specific standards and procedures. It requires the Bank's internal and external auditors to review specifically the Bank's operations to ensure they are conducted in an appropriately separate and distinct manner from all Bank affiliates. It specifies all decision-making with respect to "core operations" of the Bank must be made by the Bank's Board of Directors and officers and may not be delegated to any affiliate.

Indeed, if either the officers or Directors of the Bank act in a manner inconsistent with their fiduciary obligation or engage in or permit unsafe or unsound practices or violations of law, they expose themselves to the complete arsenal of supervisory and regulatory powers of the banking agencies, including extensive enforcement tools and sanctions¹.

In that regard, the Bank is, of course, subject to the strictures of the affiliate transactions rules and standards spelled out in Sections 23A and 23B of the Federal Reserve Act and implemented through the rules and policies of the banking agencies. Under these rules, the ability of any insured bank to extend credit to an affiliate is strictly limited and any transaction between a bank and an affiliate must be on an arm's length, market basis. The Bank's draft policy on affiliate transactions implements these rules with guidelines, standards and procedures that will result in market-based and appropriate affiliate transactions. Again, the failure to meet these standards subjects a bank and any responsible parties to prompt supervisory and regulatory action².

In short, Wal-Mart understands that the Bank will be a regulated institution and is prepared to interact with the Bank at all times in a manner that fully respects the Bank and its regulatory requirements and standards. Because of the Bank's payments systems sponsorship role, Wal-Mart has a common interest with the Bank in ensuring that its operations are of the highest quality. It is important to Wal-Mart's corporate purposes in establishing the Bank that it be an exemplary institution in all respects.

¹ See 12 U.S.C. § 1818(b)(6) & (7), (e), (i).

² See 12 U.S.C. § 1818(b), (c), (d), (e), (i), & (j).

The Bank's relationship to the payments systems

The Bank's payments systems sponsorship functions should have a positive effect on the payments systems. The commenters who raised questions about the effects the Bank would have on these systems reflected a misunderstanding of the practical operation of the payments systems and of the scope and nature of the Bank's proposed activities.

The electronic entries of Wal-Mart that will be sponsored into the payments systems by the Bank will not be novel transactions. Wal-Mart's entries obviously have been flowing through the payments systems for years without any negative impact on the economy. The transactions have been sponsored by a small number of banks without consequence to the payments systems or the insurance fund.

The use of the Bank to sponsor such entries will, if anything, reduce the existing risk to the system because of the narrow focus and additional oversight of the Company by the Bank. Acquiring banks and originating depository financial institutions generally sponsor transactions for multiple merchants with vastly different risk profiles. The Bank, on the other hand, will sponsor transactions only for Wal-Mart. Accordingly, its role will be to focus exclusively on the independent monitoring, auditing and overseeing of Wal-Mart's compliance with network and association rules. In addition, it will reconcile settlements on a daily basis. Equally important, the Bank will create a transparent record for the FDIC and the State of Utah in their supervisory functions, which will serve as a window into the operations and supervision of the payments systems.

An example of the oversight functions of the Bank that will result in lower risk to the payments system is the self-imposed requirement that Wal-Mart must comply with Visa and MasterCard payment card industry (PCI) standards for data security protection before the Bank will sponsor MasterCard and Visa transactions. It is our understanding that few, if any retailers are 100% PCI compliant. The Bank, on an ongoing basis, will monitor Wal-Mart's PCI compliance and will have the independence to refuse to sponsor transactions if Wal-Mart fails to meet the standards, or otherwise fails to comply with network and association rules. The FDIC and the Utah Department of Financial Institutions, as part of their examination process, will have the right to examine the Bank's performance and under their statutory powers, take remedial actions against the Bank and Wal-Mart, if necessary, to protect the interests of the insurance fund or the payments systems. Secure, sound, legally-compliant and efficient payments transactions are essential to Wal-Mart's business.

CRA and meeting the convenience and needs of the community

In its amended filing dated March 31, 2006, and in the document "Wal-Mart Bank CRA Activities" filed on April 24, 2006, the Bank discussed a thoroughly revised CRA Plan based

upon its request for designation as a "wholesale bank" under Part 345 of the FDIC Rules.³ Under this revised plan, the Bank would implement a robust CRA program. Our goal is to establish the bank as a leader among its peers and to serve the convenience and needs of the community in a number of significant ways, despite its limited business plan.

As a "wholesale bank" that does not engage in any lending of any kind, the Bank would be evaluated for CRA purposes based upon its community development investments and services and its responsiveness to community development needs in its assessment area. The discussion of the Bank's CRA activities submitted to the FDIC on April 24, 2006, describes in some detail the commitment of the Bank to the community it seeks to serve and ways in which it will serve the convenience and needs of the community.

The qualifying community development activities detailed in the CRA Plan include:

- 1) CRA Qualified Investment Goal of 15% of Assets. The Bank will target a ratio of CRA-related investments to average assets of 15% by the end of its first year of operation—or about \$20 million⁴. This investment ratio is far greater than is typical for insured banks.
- 2) Qualifying Investments. The Bank will endeavor to identify appropriate qualifying investments directly benefiting its assessment area, or the state of Utah, but has no assurance that it will be able to make investments at the projected level within Utah. Accordingly, in keeping with § 345.25(e)(2),⁵ The Bank anticipates that it will make qualifying investments outside its assessment area. This extraordinary commitment reflects not only the Bank's commitment to its community, but also the exemplary community support demonstrated by Wal-Mart for many years.
- 3) Technical Assistance. The Bank will work with organizations in its assessment area to provide technical assistance to community-based nonprofit organizations and development agencies.

³ Wal-Mart Bank would meet the definition of a "wholesale bank" for CRA purposes because it will not be "in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers." See 12 C.F.R. §345.12(w). In addition, the bank will not serve retail walk-in traffic in its 6th floor downtown office, have no retail branches, tellers or drive-up windows, and have no pedestrian signs or advertisements inviting retail customers to its office. The doors of the bank will remain locked during business hours for security purposes and no cash or negotiable instruments will be on site.

⁴ The Bank's ability to achieve this goal will depend on the availability of qualifying investments that meet safety-and-soundness criteria "(d) *Safe and sound operations*. This part and the CRA do not require a bank to make loans or investments or to provide services that are inconsistent with safe and sound operations. To the contrary, the FDIC anticipates banks can meet the standards of this part with safe and sound loans, investments, and services on which the banks expect to make a profit. Banks are permitted and encouraged to develop and apply flexible underwriting standards for loans that benefit low- or moderate-income geographies or individuals, only if consistent with safe and sound operations." 12 C.F.R. § 345.21(d).

⁵ "(2) *Benefit outside assessment area(s)*. The FDIC considers the qualified investments, community development loans, and community development services that benefit areas outside the bank's assessment area(s), if the bank has adequately addressed the needs of its assessment area(s)."

- 4) Program Sponsorship. The Bank will sponsor special programs or services in the Salt Lake community that provide services to low- and moderate-income residents related to housing, job creation and other CRA-qualified community development programs and services.
- 5) Assessment Area Needs Assessment: Housing. The Bank will invest in, and provide service to community organizations engaged in affordable housing rehabilitation and construction, including multifamily rental housing.
- 6) Assessment Area Needs Assessment: Community Development. The Bank will focus on developing relationships with community organizations and facilities that promote community development in low- and moderate-income areas for low- and moderate-income individuals.
- 7) Training Programs. The Bank will develop and administer a formal employee training program with regard to current consumer regulations, current civil rights laws and the Bank's policies and procedures.
- 8) Community Development CD. The Bank will market its community development certificate of deposit product to over 43,000 Section 501(c)(3) qualified nonprofit organizations on a regular basis. By offering above market interest rates or lower than market rate minimum account thresholds, these accounts will benefit these community service organizations and thus indirectly support their community activity.
- 9) Wal-Mart Involvement. The Bank will work to develop and leverage existing and future CRA-qualified activities of Wal-Mart's Salt Lake County and other Utah stores, the associates in these stores and other affiliated organizations to benefit the Bank's CRA Assessment Area and other Utah communities.

The Bank will also exhibit excellent responsiveness to credit and community economic development needs in its assessment area by doing the following:

- 1) Community Leadership – In addition to the established and ongoing leadership service of its CEO-designate with two local organizations, the senior management team and other officers of the Bank will assume leadership or advisory roles in community development, housing or social service agencies within the Bank's assessment area.
- 2) Ongoing Needs Assessment – The Bank's CRA Officer will conduct needs assessment interviews with local community development, housing and social service agencies.
- 3) Initiatives and Commitments – The Bank's CRA Officer and the Board of Directors will identify and evaluate the effectiveness of potential community-related investments, those that contribute to meeting community credit or development needs.

The Bank is unequivocally committed to the community through its investment and service activities. The Bank will also have two distinct types of indirect qualifying activities: (1) Financial products and services provided to Wal-Mart customers in stores by the Wal-Mart Financial Services Division. These include low-cost money orders (@ \$0.46 each versus \$0.75 industry average), payroll check cashing (@ \$3.00 versus \$6.00 industry average) and international remittances (@

\$9.46 versus \$15.00 industry average)⁶. These products are used especially by low- and moderate-income customers and ones who are unbanked. We estimate that our customers save \$3 to \$4 million each week by using our products, which means that annual savings exceed \$150 million and may be as much as \$200 million each year. Under existing CRA rules, these basic money service activities are specifically regarded as financial service activities appropriate for consideration under CRA. (2) Community services and donations made by Wal-Mart and the Wal-Mart Foundation. In fiscal year 2005, these donations totaled \$200 million nationally and \$2.3 million in Utah. More than 90% of these donations are made at the local level based upon recommendations by associates in each area and an assessment of local needs.

Relationship with community banks

The Bank has made repeated public commitments that it will not branch, and its business plan includes neither lending nor retail deposit gathering. More broadly, Wal-Mart's existing and long-term strategy for making banking services available to its customers relies on in-store branches of community and regional banks. The questions and concerns cited in numerous comment letters and in the hearings centered on the apprehension that the bank would have an adverse effect on community banks. Nothing could be further from the truth.

Wal-Mart has a record of partnering with independent community and regional depository institutions to provide banking services in its stores. The Bank regards its "no branching" pledge to be ironclad. Those who argue that the Bank will hurt (much less destroy) community banking are ignoring the facts.

Just as Wal-Mart uses independent suppliers to provide the goods it sells in its stores, it relies on unaffiliated providers to offer low-cost basic products and other banking products in its stores. It would be contrary to this established model for the Bank to provide retail branch banking to customers in Wal-Mart stores, and the Bank's business plan thus includes no in-store branch banking – now or in the future. The Bank will not directly significantly compete with community banks for deposit taking as its limited deposits (projected at approximately \$3.8 million at the end of three years of operation) will be sold in national markets through deposit brokers and to non-profit organizations. The projected revenues of the Bank will also not impact community banks, as the sponsorship fees currently paid by Wal-Mart Stores are being paid to large multinational banks – not community banks.

Retail branch banking services in Wal-Mart store locations will be made available through lease arrangements with community and regional depository institutions. Wal-Mart currently has independent banks in over 1,150 store locations, with an additional 250 locations opening between now and 2009. Wal-Mart's in-store bank tenant program brings full-service banking services to many low- and moderate-income neighborhoods that historically have been underserved by local banks. Since July 2003, Wal-Mart has more than doubled its lease

⁶ Industry averages based on internal estimates

agreements and now has long-term arrangements with more than 1,400 depository institution tenants, some extending out to 2024. The option to renew these leases resides with the lessees.

Thus, in fact and in practice, Wal-Mart is clearly committed to supporting community banking, not undermining it. Wal-Mart continues to expand its in-store bank long-term leasing program through a full time leasing manager supplemented by outside consultants, by advertisements in banking industry trade publications and by attendance at bank conferences. Wal-Mart Supercenters are designed and built with dedicated space for an independent bank tenant and Wal-Mart's goal is to have an independent bank in 100% of its Supercenters. Unaffiliated bank branches can be found in Wal-Mart stores in every state and represent over 300 independent banks. Wal-Mart has estimated that combined these independent banks have 6,000 to 8,000 employees in these locations.

Consolidated supervision and risk to the insurance fund

The Bank would pose negligible risk to the FDIC fund. The FDIC and Utah Department of Financial Institutions each have ample existing powers and established regulatory capabilities to ensure that this will always be the case. Commenters have asserted that approval of the Bank application would impose significant risks to the insurance fund or that the FDIC and the Utah Department of Financial Institutions lack sufficient powers to properly oversee and regulate industrial banks. They are simply ignoring the facts. The Bank's balance sheet and operations will be exceptionally low-risk, and with respect to the functions to be transferred to it from existing banks, the risk to the insurance fund, if anything, will be reduced.

First, as indicated above,⁷ a primary purpose of the Bank is to provide independent and ongoing supervision of the electronic entries submitted to the payments system by Wal-Mart. We believe that the level of care and attention that the Bank will provide with respect to Wal-Mart's payments systems entries will meet or exceed best practices in the industry today and that it will provide greater scrutiny of Wal-Mart's transactions than takes place at present.

Second, the Bank will have a very limited deposit base consisting of a projected \$2 million of deposits placed by commercial deposit brokers, and a limited number of certificates of deposit from qualified not-for-profit organizations. The Bank, as indicated in the application, will not solicit retail deposits from the public or take deposits from Wal-Mart. In fact, as mentioned earlier, the total projected deposit base is only \$3.8 million at the end of three years.

Third, the Bank will be initially capitalized with \$125 million, which is 32 times the total projected dollar amount of deposits. Furthermore, Wal-Mart has committed to provide unqualified parental support of the Bank to protect the Bank from unforeseen losses and to protect the interests of depositors. Thus, the risk to the insurance fund is negligible.

⁷ See, section entitled "The Bank's relationship to the payments system."

The argument that the FDIC and Utah Department of Financial Institutions lack power to adequately regulate industrial banks is simply incorrect. The FDIC has broad supervisory, regulatory and enforcement authority over industrial banks. The FDIC has the same authority over industrial banks that it has over other non-member insured state banks under their jurisdiction.⁸ In addition, the FDIC has substantial statutory authority to examine and take enforcement and remedial action against affiliates, as may be necessary to protect an industrial bank from adverse affiliate actions.⁹

The FDIC can use its cease and desist authority to prevent or stop unsafe and unsound practices, including practices by an affiliate, and has express authority to require affiliates to change their conduct to protect the bank. It can impose temporary or permanent cease-and-desist orders against the bank and its affiliates, civil money penalties against the bank and its affiliates, involuntary termination of insurance, or divestiture. The FDIC has parallel express statutory authority to require that banks adhere to the specific conditions of approval orders.¹⁰

The Commissioner of the Utah Department of Financial Institutions has broad supervisory regulatory and enforcement authority over Utah industrial banks that is parallel to the FDIC's authority. Such authority includes the right to examine the institution and to take enforcement and remedial actions against the bank and its affiliates.¹¹ Enforcement powers includes the right to issue cease and desist orders, remove directors and officers, take possession of the institution, and enforce supervisory acquisitions and mergers.¹² The Commissioner has authority to impose any conditions and limitations on an application for authority, as necessary to protect depositors, creditors and customers.¹³ Furthermore, all parent companies must register with the State of Utah as industrial bank holding companies, and thereby fall within the jurisdiction of the Utah Department of Financial Institutions.¹⁴ The Commissioner thus has direct supervisory authority over all industrial bank holding companies, and may take enforcement and remedial actions directly against the holding company and its affiliates as necessary.¹⁵ The Commissioner may also adopt rules with respect to industrial bank holding companies, to protect depositors, the public and the financial system of the State¹⁶.

⁸ 12 U.S.C. § 1820(b)(2). The FDIC has addressed in detail the effectiveness of its supervision of industrial banks and in 2004, adopted modifications to improve supervision. Mindy West, "The FDIC's Supervision of Industrial Loan Companies: A Historical Perspective," in *Supervisory Insights* at 9-10 (Summer 2004).

⁹ 12 U.S.C. § 1820(b). The FDIC has express power "to make such examinations of the affairs of an affiliate of a depository institution *as may be necessary to disclose fully* . . . (i) the relationship between such depository institution in any such affiliate; and (ii) the effect of such relationship on the depository institution." 12 U.S.C. § 1820(b)(4)(A) (emphasis added).

¹⁰ 12 U.S.C. § 1818(b), (c), (d), (e) and (j).

¹¹ See, e.g., Utah Code Ann. §§ 7-1-307, 7-1-308, 7-1-313, 7-1-314, 7-1-501, 7-1-510 and 7-2-1.

¹² See, e.g., Utah Code Ann. §§ 7-1-307, 7-1-308, 7-1-313 and 7-2-1.

¹³ Utah Code Ann. § 7-1-704.

¹⁴ Utah Code Ann. § 7-8-16.

¹⁵ *Supra* note 11.

¹⁶ Utah Code Ann. § 7-1-301.

Long-established cooperation between the Utah Department of Financial Institutions and the FDIC San Francisco Region has resulted in a series of significant internal controls, standards and procedures, including requirements for local management, boards of directors and files, as well as definitive business plans for Utah-based industrial banks.¹⁷ Together, the agencies have established a very effective supervisory structure and program. According to the FDIC's Summer 2004 *Supervisory Insights* there were 21 ILC failures between 1985 and 2003, and only four since 1995. None were ILCs controlled by non-financial companies¹⁸, and the failures occurred due to poor management and judgment with respect to traditional banking activities.¹⁹ This report also points out that there were no industrial bank failures in Utah between 1985 and 2003. This record demonstrates the strong regulatory environment for industrial banks domiciled in Utah.

Recent history, moreover, demonstrates that the partnership of the FDIC and the Utah Department of Financial Institutions in regulating industrial banks can effectively protect the bank as well as the insurance fund from the financial problems of its parent.

In December of 2002 Conseco, Inc. and Conseco Financial Corporation filed for bankruptcy. At the time of the filing, Conseco was the parent of Conseco Bank, a Utah industrial bank with approximately \$3 Billion in assets. Because of the bank's independence from its parent (as mandated by regulation) and the regulatory supervision provided by the FDIC and the Utah Department of Financial Institutions, the safety and soundness of the bank was never impacted or even questioned. In fact, the industrial bank was sold by Conseco to GE Capital for \$323 million which was equal to the book value of the industrial bank at year end 2002.²⁰ This experience speaks directly to commentators who expressed concern about what would happen to the FDIC fund if Wal-Mart were forced to file bankruptcy. The underlying assumption of the comments is

¹⁷ See, <http://www.dfi.state.utah.us/whatisIB.htm> for factors considered by the Utah Department of Financial Institutions in the approval process of an industrial bank application. See, Regional Director memo, transmittal number 2004-001, "Imposition of Prudential Conditions in Approvals of Applications for Deposit Insurance" for conditions that may be imposed by the FDIC when approving a deposit insurance application. See also, *Supervisory Insights* *supra* note 2 at 9-10 (Summer 2004).

¹⁸ The Conseco failure noted below occurred after the period covered by this study. The facts of that event in no way affect the FDIC's *Supervisory Insights* conclusions, and indeed underscore the effectiveness of the present reinforcing FDIC and Utah supervisory regimes.

¹⁹ *Supervisory Insights*, *supra* note 2 at 6, 11.

²⁰ The Example of Conseco <http://www.fdic.gov/bank/analytical/banking/2005jan/article3.html>. The track record of other commercial-banking affiliations also has been very strong. During the late 1980's and early 1990's when there were widespread bank and thrift failures, only a handful of thrifts held in a unitary holding company by a diversified financial or commercial company failed. At the same time, commercial and diversified financial companies acquired a number of failed thrifts and brought substantial new capital to the thrift industry. See L. White, *The S&L Debacle: Public Policy Lessons for bank and Thrift Regulation*, (New York: Oxford Univ. Press, 1991), esp. pp. 216 n.17, 228 n.27, 240-43. Finally, we would note that in the early 1980's, Baldwin-United, an insurance holding company with commercial affiliates and a bank affiliate, failed and went into an insurance insolvency proceeding. Despite this failure, the insured bank controlled by Baldwin-United was not adversely effected and was sold intact without any loss to the FDIC fund. See generally Fed. Deposit Ins. Corp., 1 *History of the Eighties - Lessons for the Future* (December 1997), esp. chapter 4.

that the FDIC and the Utah Department of Financial Institutions lack sufficient authority and oversight to protect depositors and the insurance fund.

More broadly, we believe that the experience with respect to banking failures underscores the Consecro example. The fact is, the largest and most costly failures to the FDIC fund have been banks controlled by registered bank holding companies.²¹ The powers of the Federal Reserve Board as the consolidated supervisor of bank holding companies at the times of these failures were essentially the same then as they are now. These facts suggest that there is no substance to the argument that the consolidated supervision under the Bank Holding Company ("BHC") Act approach provides greater protection to the FDIC fund than the FDIC's or the OTS's unitary holding company supervisory approach to supervision of insured depository institutions owned by commercial or diversified financial companies.

Finally, federal law plainly embodies multiple approaches to banking safety-and-soundness and does not prefer BHC Act consolidated supervision. For 25 years, non-financial companies have controlled FDIC insured banks under FDIC supervision and outside the BHC Act consolidated supervision framework. In 1987, 1989, 1991, 1994, and 1999, Congress enacted major banking legislation that addressed bank/non-bank affiliations and the regulatory tools for managing risk and advancing safety and soundness in banking. Throughout this period, the FDIC has effectively exercised the powers given it by statute for the supervision of institutions controlled by non-BHC companies, and the legislation enacted during this period facilitated and enhanced the FDIC's approach. Indeed, the history of not only the BHC Act and the FDI Act, but also of the Savings and Loan Holding Company Act leads to the conclusion that Congress has accepted the efficacy of multiple models of bank-affiliate-holding company supervision and has not endorsed any one as the preferred model. These models take into account the various structures for insured depository institution-holding company affiliation and provide correspondingly varying supervisory methods for protecting the FDIC fund and ensuring the soundness of the banking system.

The Bank's adherence to its business plan

Some commenters have asserted that if the Bank's application for FDIC deposit insurance is approved, Wal-Mart would have free reign to engage in any banking activities it wishes, without meaningful oversight and further approval by the FDIC. This assertion is plainly based on the flawed premise that FDIC and Utah Department of Financial Institution regulators do not impose and implement significant conditions on application and are not actively involved in consistent evaluation, examination and consolidated oversight of insured institutions and their activities.

The FDIC has specifically addressed the need to ensure that applicants adhere to their business plans under such terms as the FDIC deems appropriate. The FDIC routinely imposes conditions on applications (including ILC applications) that provide the FDIC within ongoing supervisory

²¹ Continental Illinois Corp., First Republic Corp., MCorp, First City Bancorporation, Bank of New England Corp., Southeast Bancorp. *Id.* at 245 n.37.

tools and authorities tailored to each application. On March 12, 2004, the Division of Supervision and Consumer Protection issued a memorandum entitled "Imposition of Prudential Conditions in Approvals of Applications for Deposit Insurance." That memorandum states: "Applicants should also understand that certain prudential conditions may be imposed well beyond the institution's initial three year period of operation." The FDIC has specific statutory authority giving it a number of tools to enforce such conditions and to take actions against a bank or affiliate that does not observe them.²²

The Bank will be subject to the same rigorous in-depth review as all financial institutions. It expects that an approval order would contain express restrictions on its ability to modify its business plan under a condition that will last for whatever period of years the FDIC deems necessary and appropriate. In light of its stated (and volunteered) pledge in its application not to engage in branch banking ("[Wal-Mart Bank] will not be open to the general public and will not operate branch offices."), the bank anticipates a corresponding condition in any approval order. Accordingly, the Bank would not be permitted (nor would it attempt) to engage in activities beyond its stated business plan without the appropriate discussion with and approval by the FDIC and State of Utah²³.

In addition, the Commissioner of the Utah Department of Financial Institutions has express authority to impose conditions on the approval of an application and regularly imposes conditions that limit an applicant's operation. The Commissioner, like the FDIC, has authority to enforce such conditions to an application and to take all necessary remedial actions if there is a violation.²⁴

For example, in the order conditionally approving the application of Target Corporation for a de novo industrial bank charter, the Commissioner required the industrial bank to operate within the parameters of the three-year pro forma business plan submitted with the application and required that any significant deviation from the business plan must have prior written approval from the Commissioner. The Commissioner also expressly prohibited the industrial bank from opening a branch or loan production office without the prior written approval of the Commissioner.²⁵

²² See 12 U.S.C. § 1818(a),(b),(c), (j)(2), (u)(1)&(3) (including cease-and-desist and civil money penalty authority).

²³ See FDIC Order, dated August 27, 2004, approving the application for deposit insurance by Target Corporation for a newly chartered Utah industrial bank, including the standard condition that "the Bank will operate within the parameters of the business plan submitted to the FDIC." That condition also required that bank to notify the FDIC of proposed material changes to its business plan before implementing any change for a three-year period, but as noted above, the FDIC has authority to impose a condition for whatever period of time it deems necessary and appropriate.

²⁴ Utah Code Ann. §§ 7-1-307, 7-1-308, 7-1-313, 7-1-314, 7-1-501, 7-1-510 and 7-2-1.

²⁵ Findings, Conclusions, and Order Conditionally Approving the Application at 3-4, In re: Target Corporation's Application for a De Novo Industrial Bank Charter for the Purpose of Establishing Target Bank, DFI 04-051 (Aug. 11 2004). See also FDIC Order, dated August 27, 2004, approving the application for deposit insurance by Target Corporation for a newly chartered Utah industrial bank, including the standard condition that "the Bank will operate within the parameters of the business plan submitted to the FDIC." That condition also required that bank to notify the FDIC of proposed material changes to its business plan before implementing any change for a three-year period,

The Bank would not be permitted (nor would it attempt) to engage in activities beyond its stated business plan without the appropriate discussion with and approval by regulators.

Banking and commerce

Many commenters have asserted that Wal-Mart's application should be denied because it represents an unprecedented mixing of banking and commerce and is incompatible with the "historic policy" of maintaining a separation between the two. Wal-Mart is well aware of the debate which has raged over the years with respect to this topic and the emotions that it engenders. Certainly, a comprehensive and detailed review of this subject is beyond the scope of this discussion. Nevertheless, several points are worthy of note.

First of all, it is true that commercial activities, with rare exceptions, are not permitted under the charters of insured banks or any insured depositories. This separation is historical and has been rather rigorously maintained. On the other hand, it is not true there has been a long-standing and comprehensive policy of foreclosing the ownership of insured depositories by commercial firms. It is quite true that the potential ownership of commercial banks by commercial companies was foreclosed under the Bank Holding Company Act in 1970. That limitation was extended to unitary thrift organizations in the Gramm-Leach-Bliley Act. Nevertheless, General Motors, Ford, Sears, General Electric, our direct competitor Target, Nordstrom, the holding company for Revlon, American Express, BMW, Toyota and others have all owned insured depositories. The names Chemical, Mellon and Manufacturers, as well as the extensive commercial and banking holdings of the Rockefellers for many decades, all reflect ownership of banks by individuals deeply involved in commerce. At least as significant is the fact that in a large number of communities, one family controls both a major local bank and other important local commercial or retail businesses — and the tradition of leading local families having such banking-commerce combinations goes far back in our history

Second, this ownership of depositories by commercial enterprises has not had significant adverse consequences. Indeed, the record of significant bank failures demonstrates that failures of such institutions owned by commercial enterprises have been very rare, especially when compared with traditional bank holding companies²⁶. Certainly neither the payments systems nor the deposit insurance funds have suffered from such ownership. Indeed, competition has been enhanced to the benefit of consumers²⁷, and in times of banking crisis, such as the 1980's, commercial enterprises have been important sources of much needed capital.

but as noted above, the FDIC has authority to impose a condition for whatever period of time it deems necessary and appropriate.

²⁶ See generally *History of the Eighties* and L. White, *The S&L Debacle*, *supra.*, and the discussion accompanying footnotes 18-21, *supra.*

²⁷ The Clinton Administration's first Secretary of Labor has recently pointed out just such benefits. See R. Reich, "You Can Bank on Wal-Mart," American Prospect online edition, May 2, 2006, <http://www.prospect.org/web/page.wv?section=root&name=ViewWeb&articleId=11459>.

Third, we believe that insistence on such a restriction has had distorting consequences on the bank regulatory system and serves as a potential restraint on competition. Over the last decade both the banking industry and ILC industry have flourished under the existing regulatory framework and consumers have benefited from innovation and competition during this period. The FDIC should apply existing law by its terms, as it has done in the past.

Finally, we note that the Wal-Mart application is certainly legally permissible. Moreover, out of deference to Congressional concerns, Wal-Mart has crafted a business plan and pledged to remain within the strictures of a legislative compromise proposed by Congressmen Frank and Gillmor. In this light, we believe that it would be unfair and singularly inappropriate for the Board of the FDIC to give weight to the view expressed in the FDIC's hearings and elsewhere that our application should be denied because it "violates" the "historic" separation of banking and commerce.

Character and integrity of Wal-Mart and its management

At Wal-Mart, we take great pride in the fact that our culture is built on a foundation of strong character and ethical behavior. It was true when Sam Walton founded the Company in 1962 and it holds true today. Wal-Mart is a company where the "tone at the top" is one of respect and integrity, and the quest for doing the right thing is paramount. Of course, Wal-Mart is a company made up of human beings. And, with over 1.3 million associates and 70,000 members of management in the U.S., individual errors and lapses of judgment will occur from time to time. When those mistakes happen, we address them in an attempt to become better as a company.

Unfortunately, however, there is a well-funded and systematic campaign to discredit Wal-Mart and its management, often by magnifying isolated exceptions or individual instances of bad judgment. Some groups would like the FDIC and the public to judge Wal-Mart not by its true character or the many positive things that Wal-Mart does every day for our society.

The issue of Wal-Mart's character and integrity as a company is very important to us. In our ongoing interaction with the FDIC or Utah Department of Financial Institutions as part of their review of our applications, and in responding to questions already posed by the regulators, we have been open and candid in addressing such issues. We of course will continue to respond to concerns of the FDIC or Utah Department of Financial Institutions. We believe that there is ample evidence of our character as a company and our contribution to our communities and society. The following are a small sampling of the recognition the Company has received.

- In 2006, Wal-Mart was named Minority Corporate Counsel "2006 Employer of Choice, Southwest Region
- In 2005, *Hispanic Magazine* named Wal-Mart one of the Top 50 Vendor Programs for Latinos

- The HACR Corporate Index listed Wal-Mart as one of the Top 10 Companies for Hispanic Communities in 2005
- In 2005, Wal-Mart was named one of "The 30 Best Companies for Diversity" by *Black Enterprise* magazine
- Wal-Mart was named to the Diversity Inc. Top 50 Companies For Diversity list for 2005
- In 2003 and 2004, Wal-Mart was listed as #1 on *FORTUNE* Magazine's "Most Admired Company in America" listing
- In 2004, Wal-Mart Stores, Inc. was honored with the prestigious "Corporate Patriotism Award" sponsored by the Employer for Guard and Reserve organization
- In 2004, Wal-Mart was listed as one of the top 50 corporations (#5 on the list) by *DiversityBusiness.com* for providing multicultural business opportunities to diverse suppliers based on a poll of more than 200,000 diversity business owners across the U.S.

Conclusion

As an FDIC insured financial institution in a highly regulated industry, the Bank will be subject to the same rules and regulations requiring its safe and sound operation as other FDIC insured institutions. A strong environment of oversight exists to appropriately monitor and examine compliance with these financial institution rules and regulations. This includes authority by the Utah Department of Financial Institutions to examine the parent and affiliates of the Bank.

The Bank has provided information to the FDIC and Utah Department of Financial Institutions to enable the evaluation of the Bank's application for deposit insurance as set forth in Section 6 of the Federal Deposit Insurance Act: the financial history and conditions of the applicant; the adequacy of the applicant's capital structure, future earnings prospects, and character of management; the convenience and needs of the community; and whether the applicant's corporate powers are consistent with the Federal Deposit Insurance Act.

Wal-Mart believes the Bank meets the statutory requirements to receive deposit insurance and that the application for deposit insurance should be approved.

Respectfully,



Jane J. Thompson
SVP, Wal-Mart Stores, Inc.
President, Wal-Mart Financial Services

cc: Commissioner G. Edward Leary, Utah Department of Financial Institutions